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**THIS DISPOSITION
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Paper No. 10
GFR

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Seedbiotics, LLC

Serial No. 75/681,024

Ken J. Pedersen of Pedersen & Company PLLC for Seedbiotics, LLC.

Tina L. Snapp, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney 105).

Before Hairston, Rogers and Drost,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Seedbiotics, LLC has filed an application to register the mark UPSTART for goods identified, following amendment, as "chemicals for use in agriculture, namely, polymer coatings to improve the longevity and germination of legume seeds," in International Class 1.¹ The Examining Attorney has refused registration under Section 2(d) of the

¹ Application No. 75/681,024, filed April 12, 1999, based on applicant's allegation that it has a bona fide intention to use the mark in commerce.

Trademark Act, in view of the prior registration of UP-START for "fertilizers" in International Class 1.

When the Examining Attorney made the refusal final, applicant appealed. Both applicant and the Examining Attorney filed briefs², but an oral argument was not requested. We affirm the refusal.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the virtually identical nature of the marks, the related nature of the goods, and the presumptive overlap in classes of consumers for the respective goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The marks appear the same, but for registrant's insertion of a hyphen between the "UP" and "START" portions of its mark. The marks would be pronounced the same and would appear to have the same connotation; at least,

² In reviewing the file, we noted that the Examining Attorney mailed her brief to a different attorney, at a different firm, than applicant's counsel. Applicant's counsel was contacted by phone and confirmed that he received the brief, though much later

applicant has not presented evidence or argument that the marks would have different connotations because of differences in the goods. In sum, the commercial impressions created by the marks are virtually identical.

The virtual identity of the marks makes it likely that, if the marks were used in connection with related goods, confusion would result. In this regard, the Board has stated that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion." In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

Essentially conceding the identity of the marks, applicant has focused on the differences in the goods and the asserted differences in their channels of trade and classes of consumers. The Examining Attorney argues that the involved goods are related because they "may... be characterized as 'chemicals for use in agriculture'" and seed coatings often contain fertilizer. Applicant admits that seed coatings "often contain a fertilizer ingredient" but argues that any purchaser of fertilizer for use in manufacture of seed coatings would not, when marketing the

than if it had been mailed correctly. Counsel also stated that applicant had chosen not to file a reply brief.

resulting coatings, reveal the identity of the fertilizer used as an ingredient thereof. Thus, applicant concludes that prospective purchasers of seed coatings would not also be confronted with the mark for the fertilizer used to make the coatings.

As an alternative argument, the Examining Attorney asserts that third-party registrations made of record are evidence that both fertilizers and seed coatings emanate from the same source. Applicant admits that it "appears to be true" that there are manufacturers that make both seed coatings and fertilizers. Yet applicant argues that the third-party registrations introduced by the Examining Attorney to support this contention do not also support a conclusion that the different goods, though emanating from a single source, are marketed to the same or similar classes of consumers through the same or similar channels of trade. In this regard, while the Examining Attorney argues that both types of goods "promote the germination of seedlings," applicant asserts that seed coatings "are sold to persons who plant seeds. Fertilizers, on the other hand, are sold to people who grow plants. Seed planters and plant growers are not necessarily the same."

The Examining Attorney's characterization of the goods as related merely because they both may be broadly

characterized as agricultural chemicals is overly simplistic. The mere fact that one may use the same broad term to describe two types of goods does not establish that they are related or competitive. Also, the Examining Attorney's characterization that both involved goods "promote the germination of seedlings" appears botanically incorrect.³ Nonetheless, there is no apparent support for applicant's assertion that planting of seeds and growing of plants are activities undertaken separately. They obviously are activities on one continuum of plant development, i.e., planted seeds germinate into seedlings (small plants or trees) whose continued growth is then cultivated. In other words, it appears fundamental that persons who plant seeds do so to grow plants, notwithstanding applicant's argument to the contrary.

Applicant admits that persons who plant seeds will use its seed coatings. These same persons will, after their seeds have germinated into seedlings, be prospective purchasers of fertilizers for use in their cultivation or

³ Seeds, not seedlings, germinate. See the definition of "germinate" at The Random House College Dictionary 553 (Rev. ed. 1982) (2. Bot. **a.** to develop into a plant or individual, as a seed, spore, bulb, or the like. **b.** to sprout; put forth shoots.). Seedlings, as small plants, grow after having been germinated from a seed. See the definition of "seedling" at The Random House College Dictionary 1191 (Rev. ed. 1982) (1. a plant or tree grown from a seed. 2. a tree not yet three feet high. 3. any young plant, esp. one grown in a nursery for transplanting.).

transplanting of the seedlings. In short, based on the identifications of goods, applicant's seed coatings and registrant's fertilizers appear to be complementary products that would be used by a common class of consumers. In the absence of restrictions in either identification-- and there are none--the goods must be presumed to travel or be marketed to such consumers through the same channels of trade. Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987).

In view of the virtually identical marks and clear relationship of the goods, there is a likelihood of confusion or mistake or that consumers would be deceived.

Decision: The refusal to register under Section 2(d) is affirmed.